95-1718

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IN THE

Supreme Court of the United States

October Term, 1995

JAMES M. CLAASSEN

v. *Petitioner,*

United States of America

Respondent,

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED ON THE PETITION

I. WHETHER THE GOVERNMENT'S STATEMENTS AND OPINIONS IN OPENING AND CLOSING AND THE INTRODUCTION OF HEARSAY REGARDING AN UNSUBSTANTIATED FDIC ETHICAL POLICY ALLEGEDLY PROHIBITING JAMES CLAASSEN FROM PARTICIPATING IN AN RTC AUCTION, WHICH WAS NOT ADMITTED INTO EVIDENCE, UNDULY PREJUDICED JAMES M. CLAASSEN AND IN AFFIRMING THE CRIMINAL CONVICTIONS THE 11TH CIRCUIT COURT OF APPEALS HAS DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED A DEPARTURE THAT THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED.

II. WHETHER THE INDICTMENT WAS BASED UPON INACCURATE AND INCORRECT GRAND JURY TESTIMONY CONCERNING NONEXISTENT FDIC REGULATIONS ALLEGEDLY PROHIBITING JAMES CLAASSEN FROM PARTICIPATING IN AN RTC AUCTION AND IN AFFIRMING THE CRIMINAL CONVICTIONS THE 11TH CIRCUIT COURT OF APPEALS HAS DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED A DEPARTURE THAT THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED. .

IIIA. WHETHER THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO ALLOW A REASONABLY MINDED JUROR TO FIND THAT A CONSPIRACY EXISTED BETWEEN THE DEFENDANTS ON THE DATE OF THE ALLEGED CONSPIRACY, SEPTEMBER 24, 1991 AND SEPTEMBER 28, 1991 AND IN AFFIRMING THE CRIMINAL CONVICTIONS THE 11TH CIRCUIT COURT OF APPEALS HAS DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED A DEPARTURE THAT THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED. .

IIIB. WHETHER THE TRIAL COURT ERRED WHEN INSTRUCTING THE JURY BY USING THE "PINKERTON"

INSTRUCTION AND BY FAILING TO REDACT ALLEGED "OVERT ACTS" FROM THE INDICTMENT THAT OCCURRED AFTER SEPTEMBER 28, 1991 AND WHETHER THE TRIAL COURT ERRED BY FAILING TO GIVE APPELLANT JAMES M. CLAASSEN'S PROPOSED JURY INSTRUCTION CONCERNING THE TERMINATION OF THE CONSPIRACY; WHETHER THE DISTRICT COURTS JUDICIAL DETERMINATION AND FINDING THAT JAMES CLAASSEN WAS NOT GUILTY OF AIDING AND ABETTING HIS FATHER IN THE COMMISSION OF THE SUBSTANTIVE OFFENSES COLLATERALLY ESTOPS THE APPLICATION OF THE PINKERTON DOCTRINE AND IN AFFIRMING THE CONVICTION THE 11TH CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDING AND HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

IV. WHETHER THE COURT OF APPEALS SANCTIONED AND DEPARTED FROM ACCEPTED JUDICIAL PROCEEDINGS BECAUSE THE COURT DID NOT REMEDY AND SUPERVISE THE EGREGIOUS TRIAL CONDUCT OF THE PROSECUTOR REQUIRES THIS COURT TO EXERCISE THE POWER OF SUPERVISION.

CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that the following is a complete list of persons and entities having an interest in the outcome of this case:

1. Gary L. Betz
   Counsel for James Claassen

2. Honorable Francis J. Boyle
   United States District Judge

3. James M. Claassen
   Defendant

4. D. Richard Claassen
   Defendant

5. Mark J. Krum
   Assistant U.S. Attorney

6. William B. Plowman
   Trial Counsel for D. Richard Claassen

7. Gregory A. Sanoba
   Counsel for D. Richard Claassen

TABLE OF CONTENTS

Statement of the Questions Presented on the Petition ..... (i)

Certificate of Interested Persons ..... (iii)

Table of Contents ..... (iv), (v)

Table of Authorities ..... (vi), (vii)

Statement of Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of the Case 1

A. Course of Proceedings and Disposition in the United States District Court for the Middle District of Florida and the 11th Circuit Court of Appeals of the United States 1

B. Statement of the Facts 2

1. The Indictment 2
2. The Defendants 4
3. The Facts Presented At Trial As They Relate To James Claassen On Or Before September 28, 1991 4
4. The Facts Presented At Trial As They Relate to James Claassen After September 28, 1991 5
5. Intentional Playing By The Prosecutor Before the Jury Heresay Ruled Inadmissable by the Court 6
6. Trial Court's Finding on Motions for Judgement of Acquittal and Jury Instructions 7

REASONS FOR GRANTING THE PETITION

Summary of Argument 8

Argument 11

I. The Government's use at trial of an unsubstantiated FDIC Ethical Policy allegedly prohibiting James Claassen from participating in an RTC auction, which was not admitted into evidence, and not based upon federal regulations unduly prejudiced James M. Claassen 11

II. The indictment was based upon inaccurate and incorrect grand jury testimony concerning nonexistent FDIC regulations allegedly prohibiting James Claassen from participating in an RTC Auction and deprived the petitioner his due process constitutional rights and his 5th Amendment right to be indicted by a Grand Jury 14

IIIA. The Evidence introduced at trial was insufficient to allow a reasonably minded juror to find that a conspiracy existed between the defendants on the date of the alleged conspiracy, September 24, 1991 and September 28, 1991 15

IIIB. The trial court erred when instructing the jury by using the "Pinkerton" instruction 18

1. It was improper, confusing and error to give the Pinkerton instruction in this case depriving the petitioner of a Fair Trial 18
2. The District courts judicial determination and finding that James Claassen was not guilty of aiding and abetting his father in the commission of the substantive offenses collaterally estops the application of the Pinkerton doctrine 20
3. The combination of the use of the Pinkerton instruction and the failure to redact acts that occurred after the completion of the conspiracy on September 28, 1991 was error resulting in the denial of a Fair Trial. 20

IV. The Conduct of the Prosecutor at trial and at the Grand Jury denied the petitioner due process and a fair trial requiring this court's supervision. 22

Conclusion 23

TABLE OF AUTHORITIES

CASES CITED **PAGE NUMBER**

Grunewald v. United States,
353 U.S. 391, 399-406, 77 S.Ct. 963, 971-75,
1 L.E.2d. 931 (1957) 10, 20, 21, 22

Ianelli v. United States,
420 U.S. 770, 777,
95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975) 16

Krulewitch v. United States,
336 U.S. 440, 442, 69 S.Ct. 716,
717, 93 L.Ed. 790 (1949) 10, 20, 21, 22

Pinkerton v. United States,
328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed.
1489 (1946) 8, 10, 18, 19, 20, 22, 23

U.S. v. Borelli,
336 F.2d 376, 384 (2nd. Cir. 1964),
cert. denied, 379 U.S. 960, 85 S.Ct. 647,
13 L.Ed.2d 555 (1965) 17

United States v. Davis,
533 F.2d 921 (5th Cir. 1976) 18, 20

U.S. v. Klein, 515 F.2d 751, 753 (3rd Cir.1975) 17

U.S. v. Kramer, 289 F.2d 909 (9th Cir. 1961) 20

U.S. v. Kriston, 508 F.2d 309 (3rd. Cir. 1975) 17

United States v. Miller,
471 U.S. 130, 144-45,
105 S.Ct. 1811, 1819-20, 85 L.Ed.2d 99 (1985) 21

United States v. Nelson, 599 F.2d 714 (5th Cir. 1979) 20

United States v. Perez,
489 F.2d 51, 61 (5th Cir.1973),
cert. denied, 417 U.S. 945,
94 S.Ct. 3067, 41 L.Ed.2d 664 (1974) 16

United States v. Rosenblatt,
554 F.2d 36, 38-39 (2nd Cir.1977) 17

United States v. Roshko,
969 F.2d 9, 11 (2nd Cir. 1992) 18, 20

U.S. v. Sperling, 506 F.2d 1323 (2nd Cir. 1974) 18, 19

U.S. v. Wilner, 523 F.2nd 68, 72 (2nd Cir. 1975) 21

STATUTES CITED **PAGE NUMBER**

18 U.S.C. 371 1,2,17
18 U.S.C. 1001 1,2,17

OTHER AUTHORITIES **PAGE NUMBER**

12 C.F.R. 336.18 (1991) 2,11,15

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The is a Petition for a Writ of Certiorari from a final decision of the United States District Court for the Middle District of Florida in a criminal case and a decision of the 11th Circuit Court of Appeals of the United States affirming the conviction and sentence on October 4, 1995 without written opinion and denying a Petition for rehearing on November 21, 1995. Therefore, this court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. 1291 and Rule 10 (a) and (c), Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The 5th Amendment to the United States Constitution.
The Code of Federal Regulations, 12 C.F.R 336.18

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the United States District Court for the Middle District of Florida and the 11th Circuit Court of Appeals of the United States.

On September 28, 1993 the Petitioner James M. Claassen (hereinafter referred to as James Claassen) was charged by indictment, along with his father, D. Richard Claassen, with one count of conspiracy to make false, fictitious and fraudulent statements and representations to a department or agency of the U.S. Government in violation of Title 18 U.S.C. 371 (Count I) and two counts of knowingly and willfully making false, fictitious and fraudulent representations of material facts to an agency of the U.S. Government in violation of 18 U.S.C. 1001 and 2 (Counts II & III). The charges stem from documents submitted to the Resolution Trust Corporation during the qualification and participation at an RTC Auction by the father Richard Claassen and the purchase of some property, the Anthony Street duplex, at this RTC Auction by Richard Claassen.

Trial by jury commenced on December 6, 1993, before the Honorable Francis J. Boyle, United States District Judge. On

December 10, 1993, Judge Boyle granted a judgement of acquittal in favor of Defendant James Claassen only as to James Claassen's aiding and abetting alleged in Counts II and III and the substantive violation alleged in Counts II and III, but submitted all three counts to the jury. (R10:196). The jury returned a verdict on December 11, 1994 finding James Claassen and Richard Claassen guilty on Counts I, II and III (R11:62-63). On December 13, 1994, the jury returned a special verdict of forfeiture ordering the Anthony Street property be forfeited to the U.S. Government (R12:43). On March 3, 1994, the Petitioner was sentenced to thirty-six (36) months of probation and 180 days of Home Detention (R13:38-39). The Petitioner has finished his term of Home Detention and is currently on probation. This conviction was affirmed without a written decision on October 4, 1995 and a Petition for rehearing was denied on November 21, 1995 by the United States Court of Appeals, 11th Circuit.

B. Statement of the Facts

1. The Indictment

The indictment in Count I on September 24 and 28, 1991 alleged a conspiracy in violation of Title 18 U.S.C. 371; to make false, fictitious and fraudulent statements and representations and to make and use false writings knowing the same to contain material false, fictitious and fraudulent statements and to make and use false writings and documents knowing the same to contain material false, fictitious or fraudulent statements in violation of Title 18 U.S.C. 1001.

The court did not submit the indictment to the jury and only submitted the essential elements of the conspiracy that it was a conspiracy to make false statements on September 24, 1991 and September 28, 1991 along with "Overt Acts" (R11:37-39). The specific acts that were false were not presented to the jury as the court generally charged on 18 U.S.C. 1001. The "manner and means" paragraphs were not read to the jury.

The indictment also alleged that it was the policy of the FDIC that any FDIC employee, the employee's spouse or dependent child, or members of the employee's immediate household should not, directly or indirectly, purchase any property which the FDIC or **RTC** (emphasis added) held in its capacity as receiver, liquidator, or liquidating agent of the assets of the insured depository institution, regardless of how the property was sold (R1-1:4-7) (The prosecutor on his own amended 12 C.F.R. 336.18 by adding the word RTC).

In Count II and III of the indictment it was alleged that the Appellants "aided and abetted by each other" knowingly and willfully caused to be made false, fictitious and fraudulent material facts and used documents and writings which themselves were fraudulent and contained false and fraudulent statements and material facts on September 24 and 28, 1991.

It was alleged in Count III that among the false statements executed on September 28, 1991 was:

A Bidders Disclosure of RTC Employee Interest Form dated September 28, 1991 on which D. Richard Claassen certified that he had no family members that had an interest, direct or indirect, or any presently contemplated future transaction in the acquisition of the property located at 2802 Anthony Street (emphasis added).

During discovery in this case, the government was requested to provide the basis for the prohibitation of an FDIC employee buying at a RTC auction, and they only provided documents based upon the Code of Federal Regulations. None of the materials supplied was a legal restriction on an FDIC employee buying RTC property during the time of this offense in 1991(See Appendix).

The Petitioner, prior to trial, filed a Motion and Trial Memorandum, seeking to exclude this inaccurate policy allegation from the opening statements, and from the trial as evidence. The court prohibited the government from going into this issue because it was not relevant. The Prosecutor, despite the court's ruling, argued this erroneous FDIC policy in opening and closing, and played a tape recording of a hearsay witness, which involved this erroneous policy. This heresay witness, Mr. Yogman, had testified in a video deposition, as to what Jessica Claassen, the wife of the Petitioner, had told him about her husband. The court had granted objections to this heresay testimony which related to Petitioner James Claassen, and a possible restriction in buying property.

Despite the court having sustained objections made by the Petitioner concerning heresay, and the testimony was non-responsive, the Prosecutor played before the jury this testimony. (R:7:30-31, 65-66, 97-100, 101-103, 108:R:8:6, 10-12, 14-15, 17-22, 61-68; R:9:13-17; R:2:-91:21-22). The court had placed the responsibility on the Prosecutor to accurately match the tape recording of the video of Yogman's testimony with the court's rulings. (R:9:13-17). During the trial the record will show that time and time again the Prosecutor attempted to present evidence that the court had

sustained objections to, and the court had to inform the Prosecution of the duty to perform Justice.

Also prior to trial and after James M. Claassen submitted a Motion and a Trial Memorandum (R1-72:7) that there was no regulation prohibiting an FDIC employee, such as James Claassen, from participating at an RTC Auction and that one of the alleged falsities in Count III would confuse and mislead the jury because the certification concerned RTC employment and was labeled "Bidders Disclosure of RTC Employee Interest", the government moved to strike this alleged false representation from the indictment. (R5:6-7).

In this case, there was no evidence presented that James Claassen had inside information concerning the property involved in the case, was working on auctions or RTC property or had any knowledge related to issues in the case because of his position with the FDIC. Even James Claassen, on the basis of his income, could have qualified to buy at the RTC Auction.

2. The Defendants

Petitioner James Claassen received a career conditional appointment as a Bank Examiner Trainee on April 8, 1991 (R6:118) (Government Exhibit 42 & 43). Almost one year later he was promoted to Bank Examiner Assistant, grade GG7, on April 5, 1992 (R6:118) (Government Exhibit 44). At the time of the offense, James Claassen's salary was only about $24,000.00 per year (Government Exhibit 43 & 44) . James Claassen lived in Tampa, Florida with his wife Jessica Claassen (R10:64).

D. Richard Claassen (hereinafter "Richard Claassen") was the father of James Claassen and was 66 years of age at the time of trial (R10:54) and in poor health (R10:97). Richard Claassen testified that he and his wife hoped to find a home that would cost less to live in because the mortgage payments were too high at his Fort Pierce home (R10:54) and he intended to find a place to live near Tampa or Winter Haven (R10:64 & 93) close to his 86 year old mother who lived in Winter Haven and was in extremely poor health (R10:64 & 93).

Richard Claassen made it a practice over the years to have deeds prepared to his son James Claassen, which were never recorded prior to September of 1991, in an effort to avoid involving this property in probate proceedings (R10:111-113).

3. The Facts Presented At Trial As They Relate To James Claassen On Or Before September 28, 1991.

On September 24, 1991 James Claassen was not present with his father Richard Claassen when Richard Claassen submitted statements to the Neighborhood Housing Services of Fort Pierce (hereinafter the NHS) including IRS returns and a Prequalification Certification Form and James Claassen was never informed or consulted about this process (R10:91).

At the RTC Auction in Tampa, Florida on September 28, 1994, James Claassen was present but never consulted with Richard Claassen before the Auction Sales Contract (Government Exhibit 7) and the Bidders Registration Certification (Government Exhibit 8) were signed by Richard Claassen (R10:101).

4. <u>The Facts Presented At Trial As They Relate to James Claassen After September 28, 1991.</u>

Richard Claassen and his son James Claassen spent a weekend fixing up one side of the duplex so that it was livable (R10:74). One part of the duplex was to be rented. Richard Claassen had informed James Claassen, after the auction, that if he (James) would look after the Anthony Street property and help Richard and his wife get around when they got to Tampa, James Claassen would get the property when he died (R10:85). Two months after the September 28, 1991 RTC Auction, Richard Claassen made out an unrecorded deed dated December 1, 1991 deeding the Anthony Street property to his son, James Claassen (Government Exhibit 22) (R10:85). Richard Claassen did not intend to transfer ownership of the Anthony Street property when he made out the deed as he had previously done with other unrecorded deeds (R10:86). Sometime in December, 1991, Jessica Claassen picked up the deed when she mistakenly assumed that she was supposed to take it (R10:86). Richard Claassen had requested that insurance be obtained for the Anthony Street duplex (R10:86). In November 1991, a State Farm employee testified that James Claassen contacted him regarding insurance on a property owned by his father, the Anthony Street duplex (R8:36). An insurance policy was issued by State Farm on December 3, 1991 in the name of Richard Claassen (R8:71). More than three months after the auction and after the closing that occurred in November, 1991, a representative from State Farm believed that James Claassen contacted him somewhere around January 7, 1992 informing him about an ownership change in the Anthony Street property and the insurance policy should be changed (R8:89). In the State Farm file was a copy of the unrecorded deed dated December 1, 1991 deeding the property from Richard Claassen to James Claassen

(Government Exhibit 22) along with an assignment of the insurance policy (R8:31).

The electricity to the Anthony Street duplex was turned on in the name of Jessica Claassen on more than one occasion for short periods of time in November and December of 1991 (R7:77-78). Jessica Claassen showed and rented one of the Anthony Street duplexes in November of 1991 to two handicapped adults (R7:95-97). Two checks written on the account of Human Development Center were given to and endorsed by Jessica Claassen as a deposit on the Anthony Street property and deposited in the joint account held by Jessica and James Claassen (Government Exhibit's 15 & 16) (R8:79).

Almost six months after the Auction of September 28, 1991, James Claassen submitted an FDIC Disclosure Statement which covered the full year of 1991 representing that he had an interest in the Anthony Street property (Government Exhibit 46) (R9:44). Agent Hanby, the case agent who summarized the FDIC Disclosure Statement, testified that he thought that an interest where you are managing a property for rental purposes should be listed on the disclosure (R9:116 & 118). The FDIC Disclosure Statement required FDIC employees to list property that they may have an interest in even if there is no income received (Government Exhibit 46) (R9:117).

5. Intentional Playing By The Prosecutor Before the Jury Heresay Ruled Inadmissable by the Court

During the trial, counsel for James Claassen objected, on numerous exhibits and contentions of the government, specifically the statements of Jessica Claassen allegedly made to Mr. Yogman, were inadmissible because Jessica Claassen was not a member of any conspiracy, the statements were not made during the course of or in furtherance of any conspiracy and said statements were heresy and irrelevant (R7:30-31) (R8:18-22). The court specifically informed the prosecution and had detailed discussions with the prosecution that there was no evidence that Jessica Claassen was an agent for her husband James Claassen (R8:18-20). The court specifically rejected the government's contention that Jessica Claassen was a co-conspirator in the case as early as June or July, 1991 (R8:21-22) and specifically informed the prosecutor:

Now, I hope that you'll listen carefully, because you had some problems on this yesterday and I don't want to have any further problems.....I will allow such part of the deposition as relates to Jessica's relationship with Richard Claassen in

terms of dealing with the property at 2208 (sic) Anthony Street, period. (R8:22).

Joseph Yogman was too sick and incapacitated to come to the courtroom to testify (R7:28-29), however, a video was taken of his testimony and certain parts of this video were played in front of the jury (R9:7). Over the objection of the defendants (R8:3-22), the court ordered the Yogman video to be edited and played for the jury so that only such part of the deposition as relates to Jessica Claassen's relationship with Richard Claassen in terms of dealing with the Anthony Street property be shown to the jury (R8:22). After the video was started, the judge ordered the video stopped because it did not comply with his rulings on the objections (R9:7). The court informed the prosecutor that the government had played video taped testimony of Mr. Yogman that was ruled non-responsive (R9:14-15). The court specifically indicated that the questions and answers on page 21 and on page 22 (R2-91:21 & 22) were not responsive and should have been deleted from the video (R9:13-14). The government was instructed to turn the audio down during certain portions of the video tape to comply with the trial court's rulings (R9:17). Again, the government played the same non-responsive heresy testimony of Jessica Claassen (R2-91:21-22). A transcript of Mr. Yogman's deposition is contained in the record on appeal (R2-91:1-69), however, an exact transcript of the video, as it was played for the jury was not taken by the court reporter (R9:34).

Jessica Claassen came to Mr. Yogman in May of 1991 to place her real estate license with him (R2-91:21). Mr. Yogman said that his relationship with Jessica Claassen was for "one transaction" (R2:91-25), to purchase RTC property (R2-91:21). According to Mr. Yogman, Jessica Claassen said "Well I can't" and Mr. Yogman said, "Well you're married aren't you? Why can't your husband?" "She said he can't because he works for some company" (Non-responsive and heresay ruled inadmissable R2-91:21-22). At closing argument the prosecutor argued the Petitioner was prohibited from buying based on this statement. It could not be for her husband because he was working (R2-91:24). Mr. Yogman said that Jessica told him that her father was contemplating buying it (R2-91:24).

6. <u>Trial Court's Finding on Motions for Judgement of Acquittal and Jury Instructions.</u>

At the close of the government's case in chief, both defendants made a motion for judgement of acquittal arguing

insufficiency of the evidence (R10:145-179). James Claassen submitted a written Memorandum in support of this motion (R1-81). The court denied the motion for judgement of acquittal as to the conspiracy count but reserved on the motion for judgement of acquittal regarding counts two and three as to James Claassen and Richard Claassen (R10:179). At the close of all the evidence, the judge ruled on the motions for judgement of acquittal denying the motions as to the conspiracy count, although the evidence against James Claassen was marginal (R10:195). The motion for judgement of acquittal was denied as to Richard Claassen on counts two and three (R10:195-196). Judgement of acquittal was granted as to James Claassen for counts two and three as to aiding and abetting and the substantive violation alleged in counts two and three (R10:196). However, the judge indicated that because of the **Pinkerton v. United States**, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489, 1946) jury instruction, he was required to submit the issue to the jury (R10:196-197).

During the charge conference and in defendant's trial memorandum (R1-72), counsel for the defendant raised the concern of the "overt acts" alleged in the indictment after September 28 were not overt acts because the conspiracy was completed but was told by the Court to argue it to the jury (R10:10). Counsel also raised an objection to the Pinkerton instruction (R10:17

During deliberations, the jury submitted a written question which read: "Can the implication of a conspiracy be drawn from the results of facts and evidence after September 28, 1991?" (R11:61). The trial court responded with "You may consider all of the evidence introduced to determine whether or not a conspiracy existed" (R11:61).

The jury returned a verdict of guilty as to both defendants on all three counts (R11:62-63).

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

I. The government's statements and opinions in opening and closing objected to by the Petitioner and held inadmissible by the court and the playing of heresay testimony by the Prosecution regarding an unsubstantiated FDIC policy allegedly prohibiting James Claassen from participating in an RTC auction, which was not admitted into evidence, but played anyway twice by the prosecutor, unduly prejudiced James M. Claassen and deprived

him of Due Process and a Fair Trial.

There was no prohibitation based on any law or regulations prohibiting the Petitioner because he worked for the FDIC from bidding at an RTC Auction. The District Court did not permit any evidence of the FDIC policy because it was irrelevant. The government argued it anyway, even though there was no law or regulations and no basis and as such, deprived the Petitioner of a fair trial. This argument and opinion of the government was severely prejudicial to the Petitioner.

II. The indictment was based upon inaccurate and incorrect grand jury testimony concerning nonexistent FDIC regulations allegedly prohibiting James Claassen from participating in an RTC auction.

At the Grand Jury, the government presented inaccurate information through the testimony of Agent Hanby that an FDIC employee such as James Claassen was prohibited from bidding at an RTC Auction. This was inaccurate and incorrect because there was no regulation and the government could present no regulation at trial.[1] The words "RTC" were added to regulations that were in existence and as such, the indictment in the case was in effect an attempt to amend the Code of Federal Regulations to make it appear that the Petitioner had some type of motive to commit a crime. As such, the Petitioner was denied Due Process and a fair trial.

III. The evidence introduced at trial was insufficient to allow a reasonably minded juror to find that a conspiracy existed between the defendants on the date of the alleged conspiracy, September 24, 1991 and September 28, 1991. The mere presence of James Claassen at an auction with his father was insufficient evidence for the jury to find that there was a conspiratorial agreement, that James Claassen was a member of a conspiracy and that James Claassen knew that the essence of the conspiracy was to make false statements.

Acts that occurred after the central purpose of the conspiracy was achieved, such as taking out insurance, deeding the property, making a disclosure statement of a management interest were insufficient acts for a reasonable jury to infer that months earlier James Claassen, on September 24 & 28, 1991 agreed to conspire, was a

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[1] In the Governments' brief in the 11th Circuit Court of Appeals, they argued outside the record and cited the Pre Sentence Report as authority for the prohibitation. This was only what the agent told the probation office. It was ironic that the Petitioner in closing argument was ethically prevented from informing the jury that the FDIC regulation did not prohibit the petitioner because it was not in evidence.

member with his father in a conspiracy and intended and had knowledge that his father was going to make false statements. A conspiracy cannot be established by piling inference upon inference and using acts that occurred after the conspiracy was completed.

In this case, it was improper, confusing and error to give the Pinkerton instruction because the jury had to infer a conspiracy from the acts committed after the substantive acts were committed while at the same time, the court is instructing the jury under Pinkerton to infer the substantive crimes were committed because the Petitioner was a member of the conspiracy. There was no evidence that it was reasonably foreseeable that James Claassen knew his father would have had to make false statements and there was insufficient proof that James Claassen was a member of a conspiracy to apply the Pinkerton charge. It is submitted that, the Pinkerton charge should only be applied to cases involving major participants because of the potential Due Process limitations on the Pinkerton doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.

Further, the District Court, uniquely granted a judgement of acquittal finding the Petitioner was not guilty of aiding and abetting, but the Court permitted the Pinkerton question to go to the jury. This finding by the District Court should have by the doctrine of collateral estoppel prevented the application of the Pinkerton doctrine.

The District Court, in instructing the jury, failed to redact "overt acts" that occurred after the conspiracy was terminated and denied the Petitioner s jury instruction which would have assisted the jury in determining which acts were made in furtherance of a conspiracy. Indeed, the District Court did not specify which acts were alleged to be false permitting the jury to speculate innocent acts of Jessica Claassen inferred a conspiracy and or the petitioner was responsible for innocent acts after September 28 under Pinkerton. Because of the instructions the defendant was denied a fair trial.

It is submitted that the holdings by this court in **Krulewitch** v. **United States**, 336 U.S. 440, 4342, 69 S.Ct. 716, 717, 93 L.Ed. 790 (1949) and **Grunewald** v. **United States**, 353 U.S. 391, 399-406, 77 S.Ct. 963, 971-75, 1 L.Ed.2d 931 (1957) holding that a conspiracy is completed when the object of the conspiracy has terminated are in direct conflict with jury instructions under **Pinkerton** v. **United States**, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) placing vicarious liability on a defendant in a criminal case. As applied in this case, once the false statements were made on September 24 and September 28, 1991, the Petitioner should not have been held responsible for acts occurring after these dates and he was denied Due Process and a fair

trial because of the Pinkerton jury instruction.

IV. The experienced prosecutor intentionally argued to the jury that the petitioner was prohibited from buying at the RTC auction even though the court found this to not be relevant and played two times heresay testimony of Mr. Yogman held inadmissable as an effort to give a reason for the Petitioner to be involved in the false statements. At the Grand Jury the same Prosecutor amended the Code of Federal Regulations adding an alleged RTC auction buying restriction knowing that there was no law as authority. This continued throughout the trial and the Court of Appeals should not have sanctioned these unethical trial tactics requiring this Court to exercise the power of supervision informing the Department of Justice these egregious trial tactics will not be tolerated.

ARGUMENT

I. THE GOVERNMENT'S USE AT TRIAL OF AN UNSUBSTANTIATED FDIC ETHICAL POLICY ALLEGEDLY PROHIBITING JAMES CLAASSEN FROM PARTICIPATING IN AN RTC AUCTION, WHICH WAS NOT ADMITTED INTO EVIDENCE, AND NOT BASED UPON FEDERAL REGULATIONS UNDULY PREJUDICED JAMES M. CLAASSEN

Before trial the theory behind the government's prosecution of the defendants was that James Claassen, as an FDIC employee, was ethically prohibited from purchasing property at an RTC Auction because of his position with the FDIC. The government argued that this prohibition was James Claassen's "motive" for conspiring with his father to make false statements to the RTC (R5:8). However, the Defendant James M. Claassen's First Motion in Limine (R1-53:1-6) presented the court with a full overview of the Code of Federal Regulations regarding who may and may not participate in RTC Auctions (V1-53). **According to the CFRs regulating FDIC employees and RTC employees, there is absolutely no prohibition against FDIC employees participating in an RTC Auction . 12 C.F.R. 336.18; See Appendix.**

The Honorable Francis J. Boyle indicated that Defendant's First Motion in Limine (R1-53) regarding FDIC employees participating in RTC Auctions was meritorious (R5:7). Judge Boyle stated that the FDIC policy, was "irrelevant" to the charge of making false statements and conspiracy to make false statements to the U.S. Government (R5:8-9). The Trial Court Judge then directed the government not to refer to the policy in his opening (R5:10).

However, during the government's opening, the government stated:

I will prove to you the evidence will show in this case that in the summer of 1991, James M. Claassen, defendant, the son, wanted to purchase an RTC property and that he called the FDIC — he was a bank examiner at that time — and that he called his employer and asked if he could purchase an RTC property at an RTC auction. The evidence will show that his employer said no. (R5:17).

The government erroneously suggested that as an employee of the FDIC, James Claassen was not allowed to purchase property at the RTC Auction, referring to the FDIC policy. In fact, James Claassen was allowed to participate at the RTC Auction according to the Code of Federal Regulations governing FDIC employees, cited previously. Further, the government failed to present any evidence during the trial that there was an FDIC or an RTC regulation prohibiting James Claassen, as an FDIC employee, from purchasing property at an RTC Auction - because no such regulation was in effect. The only reference to this theory came from the often confused Mr. Yogman who was allowed to give "double-hearsay" testimony, inadmissible under any conspiracy theory, that Jessica Claassen told him that, "He can't because he works for some company" (R2-91:21). (This statement came into evidence even though the District Court had sustained an objection and found it to be non-responsive (R9:13-14). This comment may have meant that he didn't have time because he worked for some company or that he made too much money at this company and didn't qualify to participate in the Auction. Mr. Yogman made no reference to a policy or rule prohibiting James Claassen from participating. However, in closing the government remarked:

Mutual understanding. The evidence in this case, I submit to you, is that James was and (sic) F.D.I.C. employee. And as Jessica told Mr. Yogman (sic), he can't participate because of the company he works at. He can't, James can't, go to the R.T.C. Auction. (R10:205).

The government stated further in closing: **James and D. Richard, and the government submits to you also Jessica, had a mutual understanding to get a property which neither of them — neither James or D. Richard — were entitled to get;.....James wasn't entitled to this property and neither was D. Richard** (R10:211). But for the comments and opinion of the government in opening and closing, the jury would have had no reason to infer that James Claassen had any motive to conspire with his father to make false statements to the RTC. Indeed, these comments were an attempt by the prosecution to give the jurors an opinion, not based upon any evidence or law, irrespective of the court's admonishment that it was not relevant.

The prosecution attempted to base his argument on what Mr. Yogman was allegedly told by Jessica Claassen. We submit that the government was not making a reasonable argument and it was not a reasonable interpretation of anything Mr. Yogman claimed Jessica Claassen said to try to argue that James Claassen was prohibited from going to the RTC Auction. Not only was it an unreasonable interpretation, it was an effort by the government to amend the Code of Federal Regulations (CFR) and legislate a prohibitation that was not in existence and still is not in existence. Further, not only did the introduction of Mr. Yogman's testimony violate the rules against hearsay, this testimony violated the judges direct order to limit the Yogman deposition to only "such part of the deposition as it relates to Jessica Claassen's relationship with Richard Claassen in terms of dealing with the property at 2208 (sic) Anthony Street, period." (R8:22).

The statements and insinuation made by government in opening and closing were made knowing that there was no FDIC regulation prohibiting FDIC employees from purchasing RTC property at an RTC Auction. Cir. 1982). Without these comments by the government, the jury would not have had any information to infer that James Claassen was motivated to conspire with his father to make false statements to the government. The comments improperly infer, without any evidence in support, that James Claassen was trying to circumvent an FDIC policy and acquire title to the RTC property: the same theory the government presented to the Judge before the judge ordered that there would be no reference to the FDIC policy in opening (R5:8-10). The comments clearly affected the substantial rights of James Claassen and violated his Due Process rights.

A juror listening to the government may have assumed that James Claassen was prohibited from purchasing property from the RTC because the government said, in opening, that when James Claassen called his employer and asked if he could purchase an RTC property at an RTC Auction, his employer said no (R5:17). This testimony by the prosecutor undermined the presumption that every defendant is entitled to, the presumption of innocence until sufficient evidence is provided to support a guilty verdict. When a prosecutor states facts outside the record in such a way as to prejudice the defendant, a new trial is required. Therefore the petitioner was denied Due Process and a Fair Trial.

II. THE INDICTMENT WAS BASED UPON INACCURATE AND INCORRECT GRAND JURY TESTIMONY CONCERNING NONEXISTENT FDIC REGULATIONS ALLEGEDLY PROHIBITING JAMES CLAASSEN FROM PARTICIPATING IN AN RTC AUCTION AND DEPRIVED THE PETITIONER HIS DUE PROCESS CONSTITUTIONAL RIGHTS AND HIS 5TH AMENDMENT RIGHT TO BE INDICTED BY A GRAND JURY ON TRUTHFUL AND NOT FALSE TESTIMONY.

During the trial, James Claassen was first provided a copy of the Grand Jury testimony of Agent Hanby. In the Grand Jury testimony, this lead investigator, Agent Hanby, inaccurately and incorrectly testified that the FDIC policy prohibited FDIC employees from participating in RTC Auctions But for this inaccurate testimony, there would have been insufficient grounds to include a conspiracy count in the indictment. This issue was argued in the Renewal of Motion for Judgement of Acquittal or, in the Alternative, Motion for a New Trial (R2-105, R2-113) and denied (R4:40). James Claassen submits that it was error in not dismissing this case because of the improper testimony given before the grand jury.

The Grand Jury testimony of Agent Hanby contained statements regarding the "illusory FDIC policy" that were facially unsupported by any laws or regulations. Agent Hanby made several references throughout his testimony to the fact that James Claassen was unable to purchase any RTC property because he was an employee of the FDIC:

Our investigation has revealed that an FDIC employee by the name of James Claassen who was not supposed to be able to purchase any RTC auctioned properties used his father, Richard Claassen, as a nominee or straw buyer to purchase a property for James Claassen. The property was purchased using some false statements, false information from the RTC, and subsequently deeded over to the FDIC employee, James Claassen.

* * * *

It was the policy of the FDIC that any FDIC employee, the employee's spouse or dependent child or members of the employee's immediate household should not, directly or indirectly, purchase any property which the FDIC or RTC held in its capacity as receiver, liquidator or liquidating agent of the assets of an insured depository institution, regardless of how the property was sold. (V3-116:Grand Jury Testimony)

Based upon the Grand Jury testimony of Agent Hanby, the indictment alleged:

It was the policy of the FDIC that any FDIC employee, the employee's spouse or dependent child, or members of the employee's immediate household should not, directly or indirectly, purchase any property which the FDIC or RTC held in its capacity as receiver, liquidator, or liquidating agent of the assets of an insured depository institution, regardless of how the property is sold (R1-1:4). There was no Code of Federal Regulations setting forth this policy and the prosecutor simply added the word "RTC" to an existing FDIC Code of Federal Regulation, 12 C.F.R. 336.18. There was no evidence introduced at trial to support this allegation. At the Grand Jury, the government, by prosecutorial whim, disregarded the actual regulations and, in effect, amended the Code of Federal Regulations by adding the word "RTC" to make it appear that FDIC employees could not bid on RTC property.

The Petitioner was deprived of his Due Process Rights to be charged by an indictment based upon the law and not the imagination of the Prosecutor.

IIIA THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO ALLOW A REASONABLY MINDED JUROR TO FIND THAT A CONSPIRACY EXISTED BETWEEN THE DEFENDANTS ON THE DATE OF THE ALLEGED CONSPIRACY, SEPTEMBER 24, 1991 AND SEPTEMBER 28, 1991.

James Claassen was charged with conspiring with Richard Claassen to submit false statements to the RTC in violation of 18 U.S.C. 1001. There was insufficient evidence for a reasonable jury to find beyond a reasonable doubt that Appellant James Claassen knowingly and willfully engaged in a conspiracy to make false statements to the U.S. Government and had knowledge that the "essential nature" of the conspiracy was to make false statements to the RTC. In order for a reasonable jury to find James Claassen guilty of a conspiracy, the government must present evidence sufficient to establish beyond a reasonable doubt 1) that a conspiracy to make or use false statements was willfully formed, and was existing on September 24, 1991 and September 28, 1991, 2) that Defendants willfully became members of the conspiracy, 3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged, 4) that such overt act was knowingly done

in furtherance of some object or purpose of the conspiracy as charged (R11:30-31).

There was absolutely no evidence that Petitioner James Claassen knew false statements were to be made by his father. Even if James Claassen was an employee of the RTC, which he was not, his father was not precluded from buying the RTC property and his father did not have to make false statements to qualify with the RTC. It would be outright speculation for anyone to infer James Claassen **knew** that false statements would be made.

Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. **Ianelli v. U.S.**, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975). The conspirator must knowingly agree to join others in a concerted effort to bring about a common end. **U.S. v. Perez**, 489 F.2d 51, 61 (5th Cir.1973), cert denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). In this case, the essence of the conspiracy was to make false statements and there was no evidence that James Claassen knew or agreed that false statements were to be made. The government argued on opening and closing that Appellant James Claassen had his father buy the property because he was prohibited by an FDIC policy (R5:17 & R10:205 & 211). There was no basis for the government arguing this as a motive because there was no prohibition. James Claassen could have gone to the RTC Auction himself and purchased the property because it was an RTC Auction and not an FDIC Auction.

If a conspiracy did exist, the conspiracy would have terminated upon the achievement of the criminal purpose **Krulewitch v. U.S.**, 336 U.S. 440, 442, 69 S.Ct. 716, 717, 93 L.Ed. 790 (1949); **Grunewald v. U.S.**, 353 U.S. 391, 399-406, 77 S.Ct. 963, 971-75, 1 L.Ed.2d 931 (1957), the submission of the false documents, September 24 & 28, 1991. Although the government tried to argue that the "essential nature" of the conspiracy was for James Claassen to ultimately "get" the Anthony Street property, this is NOT criminal, unethical or forbidden and cannot be the "criminal purpose" since the indictment charged a conspiracy to make false statements. It was not until arguments on Motions for New Trial that the government attempted to characterize the case as a conspiracy to transfer (R4:7). In any event, the government proved no facts that the "essential nature" of the conspiracy was an agreement for the father to buy the property for the Petitioner James Claassen.

U.S. v. Rosenblatt, 554 F.2d 36, 38-39 (2nd Cir. 1977) was a case where the only evidence against the defendant was actions after the completion of the conspiracy. In reversing a conspiracy conviction the Court stated:

The problem in identifying the "essential nature" of the conspirators' plan often arise in cases in which knowledge is an issue.

* * * *

Proof of the essential nature of the plan is required because "the gist of the offense remains the agreement and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant". **U.S. v. Borelli**, 336 F.2d 376, 384 (2nd. Cir. 1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). **U.S. v. Rosenblatt**, supra at 38-39.

In Rosenblatt, the Court found that the facts were insufficient to find that any conspiracy existed to defraud the United States. The evidence showed that a co-defendant made false entries at the Postal Service Headquarters and obtained eight checks totalling over $180,000.00. The co-defendant then "laundered" the checks through a checking account controlled by Rosenblatt with the assistance of Rosenblatt. Rosenblatt kept 10% of the face value of the checks for his services. Rosenblatt's conviction was reversed and the indictment dismissed since the government failed to plead and prove an "agreement" on the "essential nature" of the fraud. See also **U.S. v. Kriston**, 508 F.2d 309 (3rd. Cir. 1975); **U.S. v. Klein**, 515 F.2d 751 (3rd Cir.1975); U.S. v. Davis, 533 F.2d 921 (5th Cir. 1976). The government in the case at bar has failed to prove that James Claassen and D. Richard Claassen reached an "agreement" as to the "essential nature" of any criminal conspiracy.

In a false statements case under 18 U.S.C. 371 and 1001, similar to the case at bar, acts after the completion of the essential nature and object of the conspiracy could not be viewed as acts in furtherance of the conspiracy **U.S. v. Roshko**, 969 F.2d 9, 11 (2nd Cir. 1992):

.....the conspiracy terminated on October 29, 1984, the date that the INS approved Meir's application for a green card; consequently, neither the Roshko-Gershkowich divorce, nor Meir and Irene's marriage, can be reasonably viewed as overt acts in furtherance of the terminated conspiracy that had ended when its object - the acquisition of Meir's green card - was achieved. U.S. v. Roshko, supra at 11.

This theory was also applied in **U.S. v. Davis**, 533 F.2d 921 (5th Cir. 1976) in which the Court held that where an indictment alleged a conspiracy to knowingly and willfully make false statements, the conspiracy had run its course with the submission of the false statement to the department in question. The Court went on to hold that the subsequent issuance of a contract by the department in reliance on the falsification was not an overt act in furtherance of the conspiracy, despite the contention that the ultimate object of the conspiracy was to secure a payment under the contract from the government.

The government failed to prove that a conspiracy to make false statements was "willfully" formed and "existing" on September 24, 1991 and September 28, 1991 and the Petitioner should have been granted a judgement of acquittal.

IIIB. THE TRIAL COURT ERRED WHEN INSTRUCTING THE JURY BY USING THE "PINKERTON" INSTRUCTION.

The court, upon the urging of the government, gave the jury an instruction which had originated in **Pinkerton v. United States**, supra . In Pinkerton, there was no evidence that Daniel Pinkerton had committed the substantive offenses, but it was quite clear that the substantive offenses had been committed and that they had been committed while Daniel Pinkerton was involved in a conspiracy. Thus, the commission of the substantive acts were inferred from Daniel Pinkerton's involvement in the conspiracy.

1. IT WAS IMPROPER, CONFUSING AND ERROR TO GIVE THE PINKERTON INSTRUCTION IN THIS CASE DEPRIVING THE PETITION OF A FAIR TRIAL.

There are certain rare instances where there is no evidence of a conspiracy, however, there is some evidence of the substantive acts. It is possible that a conspiracy can be inferred from the substantive acts and when a Court asks a jury to infer that the Petitioner committed the substantive acts because he was in the conspiracy, we are left with the proverbial, "which comes first, the chicken or the egg". This "reverse inference" is not what the United States Supreme Court had in mind when the Pinkerton instruction was given approval. It is these rare instances where it is improper to give the "Pinkerton" instruction.

The impropriety of giving the "Pinkerton" jury instruction when this "reverse inference" situation is present was specifically addressed in **United States v. Sperling**, 506 F.2d 1323 (2nd

Cir.1974) wherein the court held that the Pinkerton jury instruction **should not be given as a matter of course**. Sperling, supra at 1341 (emphasis added). The Sperling Court was presented with a factual scenario wherein none of the Defendants were prejudiced by the Pinkerton charge since there was overwhelming evidence to support their convictions on the substantive charge.

However, the legal theory set out by the Sperling Court has direct application in the case at bar since there was no evidence introduced at trial indicating that James Claassen knew or intended to participate in any conspiracy to submit false documents to the U.S. Government. In fact, the evidence introduced indicated that James Claassen had not submitted any documents to the government, let alone false documents on September 28, 1991. In this case, the jury may have erroneously used the evidence of the substantive violations made by the father, Richard Claassen, to infer back the existence of a conspiracy. Indeed, since the court did not in the instructions specify what was false the prosecution could use innocent acts to argue membership in the conspiracy. It is highly possible that the jury may have attempted to infer back the existence of a conspiracy from overt acts after September 28, 1991 that were not criminal and alone, were insufficient for a reasonable juror to find that there was a conspiracy. If the District Court in this case could not have found that the evidence showed James Claassen aided and abetted his father, no reasonable juror could have found evidence that James Claassen had knowledge that false statements were to be made. Both aiding and abetting and conspiracy require knowledge

During deliberations, the jury came back with a question as to whether they could imply a conspiracy from acts after September 28, 1991. (R11:61) and the court informed them that they could use all of the evidence. This catch 22 put James Claassen in the middle of the inferring of a conspiracy and the inferring of his involvement in the substantive acts from the Pinkerton instruction. This is exactly the type of case the Sperling court was concerned about when it held the Pinkerton charge should not be given as a matter of course.

2. THE DISTRICT COURTS JUDICIAL DETERMINATION AND FINDING THAT JAMES CLAASSEN WAS NOT GUILTY OF AIDING AND ABETTING HIS FATHER IN THE COMMISSION OF THE SUBSTANTIVE OFFENSES COLLATERALLY ESTOPS THE APPLICATION OF THE PINKERTON DOCTRINE.

At the close of the evidence, the trial court granted James Claassen's Motion for Judgement of Acquittal as to the substantive counts only . However, the case was submitted tc the jury with the Pinkerton instruction and the jury returned a verdict of guilty as to the conspiracy count and the two substantive counts for James Claassen. We submit that there should have been a collateral estoppel because the finding that there was no aiding and abetting had to be based upon a common element, that is there were no acts or evidence to show that James Claassen intended to or knew that false statements were to be made.

Counsel is aware that "aiding and abetting" and "conspiracy" possess different elements that must be proven and a finding on one would not preclude a prosecution because of double jeopardy. However, under collateral estoppel, a factual finding may not be proven by asserting facts necessarily determined at the first trial. **U.S. v. Kramer**, 289 F.2d 909 (9th Cir. 1961); United **States v. Nelson**, 599 F.2d 714 (5th Cir. 1979). In this case we submit that the District Court, by granting the directed verdict on aiding and abetting, should have not used the Pinkerton doctrine to override the fact finding.

3. THE COMBINATION OF THE USE OF THE PINKERTON INSTRUCTION AND THE FAILURE TO REDACT ACTS THAT OCCURRED AFTER THE COMPLETION OF THE CONSPIRACY ON SEPTEMBER 28, 1991 WAS ERROR RESULTING IN THE DENIAL OF A FAIR TRIAL.

Count I of the indictment alleges that on or about September 24, 1991, and on or about September 28, 1991, the Defendants conspired to make or use false statements to an agency of the United States (R1-1:4). The ultimate object of the conspiracy was to make or use false statements to the United States on September 24, 1991 and September 28, 1991. A conspiracy ends when its criminal purpose has been accomplished. **Krulewitch v. U.S.**, supra; **Grunewald v. U.S.**, supra. See also e.g. **U.S. Davis**, supra; **U.S. v. Roshko**, supra.

Defendant James Claassen submitted a proposed jury instruction (R1-88) which read:

A conspiracy is held to be terminated upon arrest of the conspirators or upon the accomplishment of the criminal purpose. In support, the cases of **Krulewitch v. U.S.**, supra, and **Grunewald v. U.S.**, supra were cited. The trial court erroneously denied this proposed jury instruction (R11:4) and caused even greater confusion as to when the conspiracy ended.

The government alleged a series of "overt acts" which were read to the jury as "overt acts" (R11:35-37), however, only some of the acts alleged by the government can be viewed as occurring "in furtherance of a conspiracy". Appellant's objection to these numerous allegation of "Overt Acts" were raised in Appellant James Claassen's Trial Memorandum (R1-72:3-4) and again at the charge conference (R10:10-11). "Overt Acts" starting "prior to September 24, 1991" (R11:35) and continuing to "December 1, 1991" were presented to the jury (R11:37) even though the alleged conspiracy terminated on September 28, 1991 when the last allegedly false document was submitted to the RTC. A trial court may strike irrelevant portions of the indictment, including "overt acts" from a conspiracy count. See **United States v. Miller**, 471 U.S. 130, 144-45, 105 S.Ct. 1811, 1819-20, 85 L.Ed.2d 99 (1985); **United States v. Wilner**, 523 F.2d 68, 72 (2nd Cir. 1975).

It was reversible error for the court to have instructed the jury on the "overt acts" occurring after the submission of the allegedly false documents (September 28, 1991) since these acts clearly occurred after the termination of any "conspiracy". The jury had to be confused. It is impossible to determine which "overt acts" the jury used to determine whether there was a conspiracy. However, it is evident that the jury did consider the acts occurring after the termination of the conspiracy. During deliberations, the jury submitted a question which asked: "Can the implication of a conspiracy be drawn from the results of facts and evidence after September 28, 1991?" (R11:61). The trial court responded with "You may consider all of the evidence introduced to determine whether or not a conspiracy existed" (R11:61).

Did a juror then, after hearing this instruction, decide that the mortgage application made by Richard Claassen, held up by the prosecutor in closing and not a charged crime (R11:25), was a crime that could be used to infer a conspiracy? The jury instructions deprived James Claassen of a fair trial because the jury was not clearly instructed on which acts could be used in proving a conspiracy and which acts were substantive crimes. Instead, the

jury was permitted to group everything together. We believe the failure to give the Petitioners proposed jury instruction and the Court's jury instruction deprived the defendant of a fair trial and the Court was in error. The 11th Circuit's decision in this case is in conflict with this courts decisions in **Krulewitch** supra. and **Grunweald** supra. The Petition should be granted to resolve this conflict and to provide clear and concise guidelines on the use of the doctrine of vicarious liability set out in **Pinkerton supra.**

IV. THE CONDUCT OF THE PROSECUTOR AT TRIAL AND AT THE GRAND JURY DENIED THE PETITIONER DUE PROCESS AND A FAIR TRIAL REQUIRING THIS COURT'S SUPERVISION.

Throughout the trial the prosecutor time and time again attempted to get into evidence items and testimony after objections had been granted. A one and a half day trial lasted five times as long because the defense had to make objections that in the eyes of the jury the defense was responsible for the delays. The Prosecutor knew there was no evidence legally admissable showing the Petitioner was prohibited from buying at the RTC auction. He argued it anyway. When told by the court the segment of testimony of Mr. Yogman that Jessica Claassen told him her husband could not because of the company for which he worked was not responsive he played it anyway and argued it. The whole record at trial upon examination will show that it was a trial tactic to get everything in no matter what and to wear out the Court and the defense. The Court even prohibited a defendent's statement from evidence because it was not revealed. Many of the sidebar conferences were a direct result of the governments disobeyal of the Court's rulings. The trial was mixed with sidebars, objections, hearings; attempts to get into evidence pictures of the duplex ruled inadmissable; insinuating a witness was hired because the Petitioner's father owned his house when the prosecutor had the wrong address, (R10 22-25); insinuating a defense exhibit was a fraud (R 10:180, 188, 190, 191) because it was not in the company records when the Prosecutor knew records were destroyed, <u>again</u> requiring the Court to inform the prosecutor he was with the Department of Justice. (R10: 190,191).

These trial practices of the prosecutor as set out in this Petition supra. require this Court, under the power of supervision, to deter trial by trickery and trial by the prosecution without concern for justice to grant the Petition.

CONCLUSION

Now is the time for the Court to inform the U.S. Department of Justice that individual assistant U.S. Attorneys cannot amend the Code of Federal Regulations on their own; the Pinkerton instruction can be improperly recommended; there is a responsibility by the U.S. Department of Justice to have their prosecutors carry out justice, provide fair trials and due process. It is this Court's responsibility and the Eleventh Circuit to supervise any departure. Therefore, based upon the above arguments, it is respectfully submitted that the Petition should be granted and the conviction of Petitioner James M. Claassen should be reversed and the case should be remanded to the District Court with directions that James M. Claassen be discharged, or in the alternative, order a new trial.

Respectfully submitted,

Gary L. Betz
304 Plant Avenue
Tampa, Florida 33606
(813) 254-8888
Attorney for James M. Claassen

/S/ _____
Gary L. Betz

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-2335

D.C. Docket No. 93-264-CR-T-24A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT-4 1995
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D. RICHARD CLAASSEN; JAMES M. CLAASSEN,

Defendants-Appellants.

On Appeal from the United States District court for the Middle District of Florida

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BEFORE DUBINA and CARNES, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

AFFIRMED. See 11th Cir. R. 36-1.

Entered: October 4, 1995
For the Court: Miguel J. Cortez, Clerk

By: Matt Dawson
Deputy Clerk

ISSUES MANDATE: 12/11/95

11TH Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgement of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgement, direct verdict, or judgement on the pleadings is supported by the record;

(e) judgement has been entered without a reversible error of law;

and an opinion would have no presidential value, the judgement or order may be affirmed or enforced without opinion.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-2335

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 21 1995
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

D. RICHARD CLAASSEN,
JAMES M. CLAASSEN,

Defendants-Appellants.

On Appeal from the United States District court for the Middle District of Florida

---

BEFORE: DUBINA and CARNES, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

The Petition(s) for rehearing filed by appellants is DENIED.

ENTERED FOR THE COURT:

S _____
UNITED STATES CIRCUIT JUDGE

ORD-41

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

§ 336.18 Purchase of liquidation assets.

(a) An employee, the employee's spouse or dependent child, or members of the employee's immediate household shall not, directly or indirectly purchase any property which the FDIC holds in its capacity as receiver, liquidator, or liquidating agent of the assets of a bank, regardless of how the property is sold.

(b) An employee who is involved in the disposition of liquidation assets shall disqualify himself or herself from participation in the disposition of such assets when the employee becomes aware that any relative, or any organization or partnership with which the employee, the employee's spouse or dependent child is associated, has submitted a bid for purchase of such liquidation assets. The employee shall advise his or her immediate supervisor and the Ethics Counselor in writing of the self-disqualification.

(c) An employee shall not, directly or indirectly, use or release to persons outside the FDIC confidential information regarding the sale or disposition of liquidation assets except as mandated by the employee's official responsibility to liquidate such assets and only as prescribed in Division of Liquidation guidelines applicable to such sale or disposition.